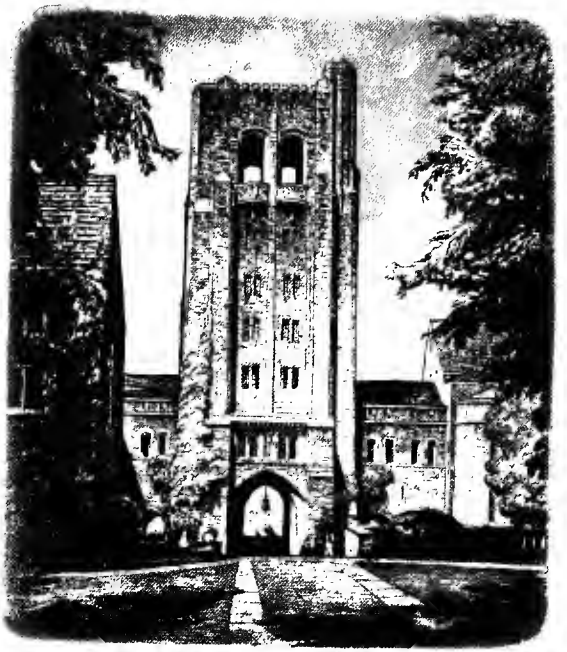
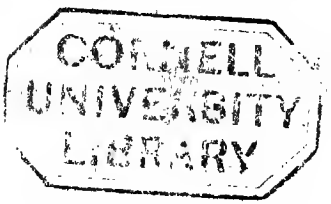


Trial by Jury



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W. H. Hamilton

THE AMERICAN SYSTEM OF TRIAL BY JURY.

AN ADDRESS

DELIVERED BY

D. H. CHAMBERLAIN,

OF NEW YORK,

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THE AMERICAN SYSTEM

OF

TRIAL BY JURY.

English law — meaning by this term, the law which in general prevails in English-speaking countries and nations,— is to a degree unparalleled in other systems, ancient or modern, an historical growth. If we direct our attention to any important feature or principle of this law, we find that such feature or principle not only comes down from a remote period in the past, but that its present form and function is largely the result of the events, customs, usages and general historical influences which have marked its history and illustrated its progress. There is no important branch of our present jurisprudence which does not at once demonstrate this fact. The English law of Real Property, including all its leading topics — the nature and kinds of Estates, the modes of Conveyance, the law of Title, Descent, Devise, and Inheritance,— the law of Mortgages, the vast range of rights of Persons and of Things, as they exist and affect us today, are deeply intertwined with the whole development of English society. Indeed, if I were to select the characteristic of English law and jurisprudence which seems most strongly to differentiate it from other legal systems now or heretofore prevalent, I should point to its strictly historical continuity and development — its slow evolution from historic germs and forces — its genuine correspondence and harmony with the changing or advancing demands of successive periods and times.

I think it may be said that the most valuable and distinctive contribution which the present age or generation has made to the sum of human knowledge — to civilization, in a broad sense — is the method or habit of investigating and explaining phenomena of nature and life by the light of their historical origin and development. I look, therefore, upon such men as Sir Henry Maine and Charles Darwin as the discoverers, in a genuine sense, of new

worlds — vast, illimitable domains of knowledge and wisdom. From such studies, led by such guides, we have spelled out what seems to be a law of all natural existence, more sweeping in its stretch, deeper in its reach, higher and more fruitful in its results and prophecies, than any known to former generations. That law is no other than the cosmic law of development — evolution — a law which contradicts no sound learning of the past, destroys nothing valuable in old opinions and faiths, but makes rounded what before was fragmentary, explains what before was inexplicable, and discloses new lines and sure prophecies of advance not before dreamed of.

No field of human history, it seems to me, is shown to have been more completely under the reign of this law than the field of English law. We have been truly told by the highest authority[1], that "the earliest notion of law is not the enunciation of a principle, but a judgment in a particular case." By a process as logical as natural, we pass by a series of judgments in similar cases, to rules and principles of general application — reaching in this way the idea and fact of *the Law*. English law is in this respect scarcely peculiar, for this rubric of growth has prevailed historically, in a large sense, in all important systems of law. English law, however, has had three chief sources, or to state it more exactly, it has in its development assumed three leading forms, moved along three main lines — unwritten law, written law, and statute law. I do not think it correct to ascribe our law chiefly to the process and source which we usually call the common law. Our common law, in the order of time, preceded for the most part the other forms and sources of our law. As the barons at Runnymede are said to have marked their assent to Magna Charta with their sword-hilts, because they could not write, so our earliest law by obvious necessity was unwritten. But our Equity law, which is mainly written law, grew by the same methods and from the same sources,— the wants of society and the gradual accumulation of particular decisions. Both systems or branches were equally marked, in the earlier stages, by a natural, silent, almost unnoticed growth — growth, too, at the hands of courts and judges, not of parliaments, legislatures, or law-givers. Statute law, or law proceeding directly from legislative authority, which is *ex vi termini* written

[1] Austin, Jurispr. 2, 83.

law, has likewise from early days moved step by step with the other forms of our law. The great statutes of Henry II., of Edward I., of Henry VII., of Henry VIII., of Elizabeth, and of Charles II., are not only great landmarks and historical sign-posts in the march of English law; they are the very sources —*fons et origo* —of a great part of our settled law and jurisprudence. Lord Bacon has said, as pithily as truly, that each feature of our law can be traced to its source, as surely as each of the converging streams that make up a great river can be traced, by "the tastes and tinctures of the soil through which it has flowed." Our common law, equity law, statute law, — written and unwritten law — are, each alike, *growths* — marked and determined alike by the varying needs of successive periods or exigencies — indented, shaped, moulded, as we now see them, by the influences of a continuous, historical, natural evolution.

"Not Nature's self more freely speaks in crystal or in oak,"—

than she has spoken and now speaks in the Law which in general characterizes the English race; and because it is a *growth*, and not a fabric, because it is, like the manners and culture of the race, the slow result of development from within, spontaneous and self-selected, not imposed or contrived by an authority or influence from without, our English system of law stands today before the world, in the almost unanimous judgment of the competent, as the most adequate embodiment and expression of the sense, as well of the method, of Civil Justice; that "Justice" which Sir James Mackintosh has told us,[1] "is, after all, the permanent interest of all men, the only security of all Commonwealths;" and of which Cicero said,[2] *Hoc verissimum est, sine summa justitia rempublicam geri nullo modo posse.*

We have been led to this rapid summation of the characteristic sources and methods of English law, on this occasion, because I am set to examine one important feature of its legal policy, one signal method of its legal administration, one remarkable instrument of the enforcement of its civil justice; and in the discharge of this duty, it is my purpose to examine our System of Trial by Jury, not as a theory nor an ideal, but as a fact, — to inquire not so much how it harmonizes with *a priori* conceptions or scientifi-

[1] Misc. Essays, 43.
[2] De Repub. lib. II.

cally-devised models, but rather what in fact it is, what it accomplishes, how it suits, has suited and seems likely to suit, the wants, sentiments, prejudices, habits; in a word, the *genius* of the English race.

In making such an examination of any notable institution of our legal system, nothing is more necessary than an ever-present consciousness of the fact to which reference has now been made—that our law and our legal institutions, almost without exception, come to us hoary with age, the slow moderated growths and accretions of many generations, and of several centuries; that if we can boast of freedom and enlightenment beyond other nations, they are ours, because ours is

> "A land of settled government,
> A land of old and just renown,
> Where freedom broadens slowly down,
> *From precedent to precedent.*"

In his profound and brilliant chapter on the "Modern History of the Laws of Nature," Sir Henry Maine has said:—[1]

"There are two special dangers to which law, and society, which is held together by law, appear to be liable in their infancy. One of them is that the law may be developed too rapidly. This occurred with the Codes of the more progressive Greek communities, which disembarrassed themselves with astonishing facility from cumbrous forms of procedure and needless terms of art, and soon ceased to attach any superstitious value to rigid rules and prescriptions. It was not for the ultimate advantage of mankind that they did so, though the immediate benefit conferred on their citizens may have been considerable. One of the rarest qualities of national character is the capacity of applying and working out the law, as such, at the cost of constant miscarriages of justice, without at the same time losing the hope or the wish that law may be conformed to a higher ideal."

Referring, for illustration, to the mobility of the Greek mind and the fickleness of the Greek judicial sense, he continues:

"No durable system of jurisprudence could be produced in this way. A community which never hesitated to relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts of a particular case, would only, if it bequeathed

[1] Anc. Law, 72.

any body of judicial principles to posterity, bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted. It would amount at best to a philosophy, marked with the imperfections of the civilization under which it grew up."[1]

English jurisprudence consists preëminently of judicial materials and "framework" to which the more advanced conceptions of successive periods and generations have continually been fitting and adjusting themselves without break in the continuity of historical life; for, says Palgrave,[2] "by far the greatest portion of the written or statute laws of England consists of the declaration, the re-assertion, the repetition, or the re-enactment, of some older law or laws, whether customary or written, with additions or modifications. The new building has been raised on the old groundwork; the institutions of one age have always been modeled and formed from those of the preceding, and their lineal descent has never been interrupted or disturbed."

No more conspicuous example of this characteristic can be pointed out than the institution of Trial by Jury.

Its precise origin in our history is an inquiry more difficult than important, but its interest has been sufficient to attract the labors of learned investigators whose conclusions are far from uniform or harmonious; but it is clear, at least, that it did not owe its origin to any positive law; it was not the creature of any royal edict nor of any Act of Parliament. Its forms, as well as its functions, arose from usages and customs which took their place silently and gradually in the life of the people. Its purely English origin has been till recently stoutly asserted by many, Blackstone calling it "a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof." "Many writers of authority," says Canon Stubbs,[3] "have maintained that the entire jury system is indigenous in England, some deriving it from Celtic traditions based on the principles of Roman law, and adopted by the Anglo-Saxons and Normans from the people they had conquered. . . . . Those who ascribe it to Norman sources do not agree as to the source

[1] P. 73.
[2] Eng. Commonw. 1, 6.
[3] Const. Hist. of Eng. I, 612.

from which the Normans drew it. One scholar would derive it from the Norsemen of Scandinavia, another ascribes it to the influence of the canon law; another traces it through Gallic usages to Roman principles; another derives it from Asia through the Crusades, and another ascribes its beginnings to the Slavonic tribes of Northern Europe." Freeman, in his "Norman Conquest,"[1] rejects the notion that it is due to a single legislator, in England or elsewhere, or that it was "copied from this or that kindred institution, to be found in this or that German or Scandinavian land, or brought over ready-made by Hengist or William."

Disregarding all partial views, the well-established truth seems to be that forms of trial resembling in greater or less degree trial by jury are part of the primitive institutions of all nations. Thus the *dikasterion* of the Greeks, the *judices* of the Romans, the compurgators of the Saxons, and the recognitors of the Normans, are each, in some striking particulars, archetypes of the trial by jury. The Greek dicasts were, however, a body of citizens numbering some thousands from which a smaller but indeterminate number was chosen for the actual trial and decision of cases. The jury or body thus chosen often numbered 500. The Roman *judices* were doubtless derived from the Greek dicasts. The ordinary translation of *judex* is judge, but the idea of the Roman *judex* is much more nearly that of the modern juryman. The compurgators of the Saxons, on the other hand, were the accused and his friends who appeared and swore to the innocence of the accused or to the claim or defense of the party. But the nearest approach in its day to the modern trial by jury appears in the system of recognition by sworn inquest, introduced into England by the Normans. "That inquest," says Stubbs,[2] is directly derived from the Frank capitularies into which it may have been adopted from the fiscal regulations of the Theodosian code, and thus may own some distant relationship with the Roman jurisprudence." The Norman system of recognition consisted of the submission of questions of fact, relating to fiscal and judicial business, by officers of the crown to sworn witnesses in the local courts. This system, brought in by the Norman conquerors, combined with the system of Saxon or Anglo-Saxon compurgators, and out of these elements arose the institution of the jury.

[1] Vol. V. 451.
[2] Const. Hist. of Eng. 1, 613.

Without entering here upon lesser details, it may be said that there came a time when, by an enactment of royal authority,—the Statute or Assise of Henry II.,—the distinct form of the present institution appears. "In it," says Forsyth,[1] "we first find the jury in its distinct *form*, but the elements of which it was composed were all familiar to the jurisprudence of the time, and we shall see that as regards its definite constitution, it involved no idea novel to the minds of our ancestors."

The assise, or grand assise, of Henry II., was a mode of trial confined to questions of the recovery of lands of which the complainant had been disseized, rights of advowson, and claims of vassalage. In cases of disseisin, the demandant duly appeared in Court and declared his case, concluding with the words, "And this I am ready to prove by this my freeman C., and if any mischance happen to him, then by another, D." The champion thus offered by the demandant was one who could, from his own knowledge, testify to the justice of the demand. But the tenant was not obliged to accept the combat thus offered. He might avail himself of the enactment of Henry II., and choose the trial by assise, *magna assisa domini regis*. A writ was thereupon addressed to the sheriff commanding him to summon four knights of the neighborhood where the property lay, who, after being duly sworn, were to choose twelve lawful knights, who were most cognizant of the facts, and who were to determine on their oaths which of the litigant parties was entitled to the land. The defendant was also to be summoned to hear the election of the twelve jurors by the four knights, and might except to any of them. When the twelve were duly chosen, they were summoned by writ to appear in court and testify on oath the rights of the parties. When they met to try the case, if any of the twelve were ignorant of the facts, they so declared, and others were then summoned who had knowledge of the facts, until at least twelve were found who were acquainted with the facts. But, if the jurors when chosen were not unanimous in their conclusion, others were added until twelve at least agreed on one side or the other; and the concurrent testimony, or verdict—*veredictum*—of such a jury was conclusive.[2]

In considering what suggested or gave form to this institution

[1] Tr. by Jury, 101.
[2] Forsyth, Tr. by Jur., 103-105.

of assise — which seems to be the proper origin, or at least the earliest real archetype of the modern Trial by Jury — it is sufficient, perhaps, to say that it was the constant practice in the times of the early Norman kings in controversies relating to lands, to appeal to the knowledge of the neighborhood, or, in many instances, to summon a number of witnesses who represented the vicinage, to state on oath to whom the lands belonged. In principle or theory, there was no real distinction between these Norman inquests and the recognitions by the knights of assise under Henry II., and we may safely conclude that the latter was derived from the former. In each, the verdict or deliverance was the testimony of witnesses having knowledge of the matter in dispute; and if we substitute the determinate number of knights under the English assise for the indeterminate number of the *probi homines* of the Norman inquest, we have a procedure which may fairly be said to prefigure the later trial by jury.[1]

The assise, or trial by assise, is first mentioned in existing English statutes in the Constitutions of Clarendon, A. D. 1164, wherein certain disputes between laymen and clerks were to be determined before the chief justiciary by the verdict of twelve lawful men — *recognitione duodecim legalium hominum.*

It was one of the most valued provisions of Magna Charta, (A. D. 1215) that legal suits should no longer follow the ambulatory royal court, but should be tried in some fixed place, and that recognitions by assise should be taken in the counties where the lands lay, for which purpose the king was to send into each county four times a year two justiciaries, who, with the four knights, were to take the assise, that is, to summon the twelve recognitors. Glanvill, the earliest of our English judicial writers, who wrote in the reign of Henry II., and Bracton, who wrote about the middle of the 13th century, and the author of the treatise called "Fleta," written in the reign of Edward I., describe the assise and its changes. This institution not only remained on the statute book till the enactment of the Statute of 3 and 4 William IV., but as late as 1838 a trial took place before Chief Justice Tindal in the English Court of Common Pleas, where four knights girt with swords and twelve other recognitors acted as the jury and were addressed as "Gentlemen of the Grand Inquest" and "Recognitors of the

[1]Forsyth, Tr. by Jur., 112.

Grand Assise."[1] (*Davies* v. *Lowndes*, 5 Bingham's Reports, New Cases, p. 161).

While the Assise of Henry II. was in vogue, a procedure came into use, known as the *jurata*, of which mention is first made in Glanvill. Forsyth holds that this procedure and name arose from the mode adopted in Anglo-Saxon times, of referring disputes concerning lands to the knowledge of the *comitatus* or county, or as afterwards in Anglo-Norman times, of allowing the neighborhood to be represented by a certain number of *probi et legales homines*, who stated on oath on whose side the right lay. These latter were the *jurata patriæ*, or often simply *patria*, as representing the whole country whose decision their verdict was deemed to be. The distinction between the *assisa* and the *jurata* seems to have been that the *assisa* had a technical meaning and applied only to cases which involved the recovery of land or realty, or the fact of villenage, the verdict of the recognitors being confined to the question of the rightful seisin of the land, or the civil status of the individual. Other issues arising in the course of the trial of such issues could not be determined by the recognitors *as such*. Hence the assise, for the purpose of deciding these issues, was turned into what was called the *jurata* — a fact expressed by the phrases *assisa vertitur in juratam*, or *cadit assisa et vertitur in juratam*,— and the issue was said to be decided *per assisam in modum juratæ*.

Whether the same recognitors acted as the *jurata* is perhaps not clear, but Forsyth, agreeing with Reeves, in Hist. Eng. Law, Vol. I., Ch. 6, thinks the recognitors of the assise and the *jurata patriæ* were in such cases one and the same body, but it is certain that in both the assise and the *jurata*, the verdict or deliverance was neither more nor less than the result of the testimony of the jurors, delivered to the Court as the warrant and basis of its judgment.

The end of the 13th century, therefore, saw the first establishment in England of an institution or procedure for the judicial settlement of civil controversies, which may be described thus: THE SELECTION UNDER THE AUTHORITY AND COMMAND OF THE KING'S WRIT, OF A FIXED NUMBER OR BODY OF FREEMEN FROM THE VICINAGE OF THE SUBJECT OF THE DISPUTE, WHOSE TESTIMONY FROM PERSONAL KNOWLEDGE OF THE FACTS, WHEN RESULTING IN A UNANIMOUS CON-

[1]Forsyth, Tr. by Jur., 115.

CLUSION, WAS RECEIVED AS CONCLUSIVE OF THE FACTS, AND BECAME THE BASIS OF THE JUDGMENT OF THE COURT THEREON.

The striking and radical contrast between this institution and our present trial by jury will not escape attention; namely, that the jurors of the 13th century were only sworn witnesses; and it becomes a most interesting inquiry how, when and why, English jurors ceased to be witnesses and gave their verdict upon the evidence laid before them.

It seems clear that the practice of introducing evidence before the jury as the ground of their verdict began in the case of deeds to which persons were named as witnesses. In such cases the witnesses to the execution and delivery of the deed made their declaration to the fact, though it is thought by some writers that in the earliest stages of the jury this difficulty was met by summoning the witnesses to the deed as members of the assise or *jurata*. They thus became part of the jury by reason of their special knowledge of the facts, but the separation of witnesses from jurors was well-established in the reign of Edward III., as appears by the Year Books of that period.[1]

Moreover, contemporaneously with the assise and the *jurata*, another mode of trial had obtained place, called trial *per sectam*, the *secta* being the sect or body of supporters or witnesses whom either party to a controversy might vouch in on his own behalf and who had personal knowledge of the transaction in question. This proceeding is not mentioned by Glanvill, but there is abundant evidence that, like the witnesses to deeds, the *secta* gradually came to give their evidence before the jury, so that as early as the 11th year of Henry IV., (Year Book, 2 Henry IV.,) we find the judges declaring that "the jury, after they are sworn, ought not to see or take with them any other evidence than that which was offered in open court." "This effected a change," says Spence, in his "Equitable Jurisdiction,"[2] "in the modes of trying civil causes, the importance of which can hardly be too highly estimated. Jurors, from being, as it were, mere recipients and depositaries of knowledge, exercised the more intellectual faculty of forming conclusions from testimony, a duty not only of high importance, with a view to truth and justice, but also, collaterally, in encouraging

[1]Forsyth, Tr. by Jur., 128.
[2]p. 129.

habits of reflection and reasoning, which must have had a most beneficial effect in promoting civilization."

At the present day, if the fact that a juror had personal knowledge of the facts were not a ground of objection to his competency, yet if a judge were to direct a jury to consider their own personal knowledge outside of the evidence of witnesses, in reaching their verdict, it would be clear ground for a new trial. Recently a juror in New York city who was shown to have visited the scene of an alleged crime for the purpose of informing himself as a juror, was adjudged by the Trial Judge guilty of a contempt of court, the Court of Appeals afterwards holding that such conduct was not technically a contempt though it might be punishable as a misdemeanor.[1]

It will be observed that our examination of trial by jury, thus far, shows that it was originally a procedure applied only in civil matters, and in the first instance, limited to disputes involving the right to lands or the status of freeman or *villein*. We find no trace of a jury for the trial of criminal causes before the Norman invasion. Glanvill, in describing the modes of criminal trial, mentions only the judicial combat, compurgation, and the ordeal of hot iron, in case of a freeman, and of water, in case of a "villein," the distinction being that the combat applied to a case where the accuser came forward to make the charge, while compurgation was the ordeal applied where the charge rested on public rumor or belief. Owing to the prevalence of the custom of holding each neighborhood responsible in a degree for all offences committed within it and the natural unwillingness of individuals to come forward as accusers, the Constitutions of Clarendon (A. D. 1154) provided that where one was suspected against whom no private accuser appeared, the sheriff should swear twelve lawful men of the neighborhood who should "declare the truth thereof according to their conscience." These jurators for a long time combined the functions of accusers and triers. By an ordinance of Richard I. (A. D. 1194) four knights were chosen from each county who in turn were to choose two from each hundred, each two of the latter choosing ten "lawful and free men out of each hundred," who, with the two first chosen, making twelve, were to present crimes and make arrests in the respective districts. Here are found, plainly, the germs of the Grand Jury and the Trial Jury.

[1]N. Y. Rep., 101, 245.

For a long time after the principle was in some sort established that the trial of criminal offences was a function of the jury, the accused could not demand it as of right, but it was bestowed by the King's grace, often purchased by the payment of money. Instances of this are of record as late as the reign of Henry III. In the time of Bracton — about the middle of the 13th century — the usual mode of trial was by combat, but, in most cases, the accused could *put himself upon the country.*

In the reign of Edward III. the separation of the accusing from the trying body — the Grand from the Trial Jury — had become prevalent and fixed. The qualification of personal knowledge on the part of the trial jurors, like the same qualification in civil causes, remained only in the requirement that the jurors should be summoned from the hundred where the crime was alleged to have been committed, a requirement finally reduced in England to the calling of jurors in both civil and criminal causes, from the body of the county.

We may now say that we have discovered, in the progress of English history, at about the middle of the 14th century, an institution of which the essential features are these: THE CHOICE OF A BODY OF LAYMEN, USUALLY TWELVE IN NUMBER, OUT OF THE WHOLE MASS OF QUALIFIED CITIZENS OF THE COUNTY, TO ASCERTAIN, UNDER THE GUIDANCE OF A JUDGE, THE TRUTH IN QUESTIONS OF FACT ARISING EITHER IN CIVIL OR CRIMINAL CAUSES, BEING RESTRICTED TO THE EXCLUSIVE CONSIDERATION OF MATTERS THAT HAVE BEEN PROVEN BY EVIDENCE IN THE COURSE OF THE TRIAL.

These features are now the essential elements in the present English and American system of Trial by Jury. For over 500 years, therefore, the system has stood the highest and most crucial of all tests — the test of time and experience.

But before we proceed to examine its merits or defects, let me notice the curious if not important query, why the English trial jury from almost its first appearance was limited to the number of twelve; for it is found in some early writers that the verdict of eleven jurors out of twelve was accepted, and it was not until the reign of Edward III. that it was finally decided that there could be no legal verdict which was not the unanimous opinion and finding of the whole jury. It is further to be observed, that in the assise of Henry II. the jury did not consist of twelve, though no

verdict could be conclusive in which twelve of the jury did not unite. The mode of procedure was that if twelve did not agree, others were called in until at least twelve reached a unanimous conclusion — a process called *afforcing* the jury. Mr. Starkie[1], however, regards it as doubtful whether the process of afforcement was ever applied in criminal causes. That twelve was a favorite number is well established. Mr. Hallam remarks[2] that this number was not confined to England, nor in England nor elsewhere to judicial institutions, and he adds, "Its general prevalence shows that in seeking for the origin of trial by jury, we cannot for a moment rely upon any analogy which the mere number affords."

On this point, Forsyth says,[3] "It is not difficult to discover why the number, twelve, was chosen. Twelve seems to have been the favorite number for constituting a court among the Scandinavian nations. We have seen that in the Anglo-Saxon polity the twelve senior thanes were to go out, and the reeve with them, and swear on the relic given them in hand, that they would accuse no innocent man. Twelve "Lahmen" were to administer the law between the British and the Angles. The number of compurgators in cases of importance was usually twelve, so that it became a common expression of Anglo-Norman law to say that a man freed himself from a charge by the twelfth hand, and this number prevailed equally on the continent. Long habit had taught men to regard it as the proper amount of evidence to establish the credibility of a person accused of an offence; and it was natural that the same number should be required when the witnesses came forward, not to speak to character, but to facts."

In an old tract published in 1682, entitled "Guide to English Juries," and attributed to Lord Somers, it is said: "In analogy, of late the jury is reduced to the number of twelve, like as the prophets were twelve, to foretell the truth; the apostles twelve, to preach the truth; the discoverers twelve, sent to Canaan, to seek and report the truth; and the stones twelve, that the heavenly Jerusalem is built on; and, as the judges were twelve, anciently, to try and determine matters of law; and always, when there is any waging law, there must be twelve to swear in it; and, also,

[1]Tr. by Jur., 17.
[2]Midd. Ages, vol. II., ch. viii., 273
[3]Tr. by Jur., 108, 109.

for matters of State, there were formerly twelve Councillors of State. And anything now which any jury can be said to do, must have the joint consent of twelve, else it is, in construction of law, not the doing of the jury, but of private persons, and void."

"If the work of forming verdicts," says Bentham,[1] "had been the work of calm reflection, working by the light of experience, in a comparatively mature and enlightened age, some number, certain of affording a majority on one side, viz.: an odd number, would on this, as on other occasions, have been provided; and to the decision of that preponderating number would of course have been given the effect of the conjunct decision of the whole."

Upon the whole, no very logical reason can, perhaps, be found for fixing the number of the jury at twelve. It was due, probably, to some degree of fanciful, superstitious, or customary deference to or faith in that number, though it may be considered that that number affords a fair test in general of the average sense, intelligence and judgment of a community. At all events, it is unreasonable to believe that the steady adhesion for five centuries or more to that number has not rested on a conviction that it affords at least as strong a guarantee as any other number could, of such results as the jury was at first fashioned and is still intended to secure in the administration of the law.

It is of interest here to note an historical error connected with trial by jury which still has the sanction of the great names of Blackstone and Hallam,—that the phrase *judicium parium*, or "judgment of one's peers," as used in Magna Charta, had reference to trial by jury. The phrase greatly antedates Magna Charta, and *judicium parium* was a well-known and peculiar term applied strictly to the feudal procedure by which the lord with his vassals sat to try questions of title between others of his vassals. The phrase was current in France likewise long before any such institution as the jury existed. Moreover, at the time of Magna Charta, the jurors, so far as they were known at all in England, were merely witnesses deposing to facts with which they were familiar. How could their testimony have been called a *judicium?* Glanvill, in speaking of the verdicts of juries, says *Stabit veredicto visineti*, but in referring to the judgment rendered on the verdicts of juries, he says, *secundum dictum visineti judicabitur*. Coke, too, in his

[1]Art of Packing, as applied to Special Juries.

Institutes, expressly distinguishes between trial by peers and trial by jury; and Forsyth points out that amongst the *pares* of the baronial courts the opinion of the majority prevailed — a characteristic never belonging to juries.[1]

This system or institution thus developed in England, was, of course, brought to this country, and from the earliest periods in the history of the States of the Union, it has had its place in civil and criminal procedure. Whatever the original nationality of the founders of the several American colonies, so strong was the influence of the English example that trial by jury soon became the law of all the colonies and the common right of all the people.

No stronger proof of the value attached to trial by jury, and the universality of its adoption, can be adduced than the fact that the Constitution of the United States, as well as the present Constitutions of all of the States, as well as most of the successive Constitutions of the States, as they have been from time to time amended, revised or newly made and adopted, have in some form of express words decreed the inviolability and perpetuity of trial by jury. The terms used in the Constitution of the United States are, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," and "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In a majority of the State Constitutions the broad provision is made that "The right of trial by jury shall remain forever inviolate." In not a few, provision is made that the jury shall be drawn from the county, district or vicinity in which the offence was committed, the Constitution of Massachusetts in particular, declaring that "in criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the citizen."

Embedded thus in the historical foundations of the civil government and jurisprudence of the English people, entrenched behind the strongest and most permanent defences which the people of this country can erect — the organic laws and constitutions of the United States and of the several States—Trial by Jury presents

[1] Forsyth, Tr. by Jur., 91 *et seq.*

itself as one of the foremost features of the system of jurisprudence under which the English race has been trained, concurrently with which it has gained its liberties, and through which it is believed, as is evident, those liberties will in the future be preserved.

We can, therefore, hardly put ourselves to a worthier or more useful task than that of inquiring in what lie the strength and value of this system, in what lie, perchance, its weakness and defects, what of it should be guarded and preserved, and what, if any, may be discarded or changed.

Mr. Starkie's definition of a jury is as follows:[1] "A jury, as now constituted, may be defined to consist of "twelve men *selected* from the body of the community, and *sworn* to decide any disputed matter of fact by *judging* upon evidence lawfully submitted to them."

If we mark closely this definition, we shall observe that the first idea it presents is that of a selected number of men from the body of the community. In theory, it is everywhere the aim to secure a fair average of the character, standing and intelligence of the community. Such a body of men, if impartially and fairly chosen, becomes in the first place fairly and strictly representative of the community from which they are selected. The parties to a civil cause, the accused in a criminal cause, find themselves brought to the bar of a tribunal composed of men in general of like conditions in life, of like sympathies, situations and surroundings. Their acts are to be viewed and judged of by those who are capable of entering into the special circumstances which are presented, of applying a standard of judgment and feeling which will be the result of an intimate and life-long familiarity with the conditions of life which are thus presented.

The true standard of judgment in all cases, the true rubric of impartial conclusions, is the consideration, by those who are called to judge, of the proper interpretation and valuation of the specific facts brought before them. This is a faculty which is not developed by mere intellectual ratiocination or mental capacity, is not the necessary or perhaps usual result of learning or wide observation, but comes best and most surely from the fact of life, habits, pursuits, interests and sympathies which have been concerned with facts like those which are presented for judgment. Such a capac-

[1] Tr. by Jur., 4.

ity or faculty of judgment may be said, in some large sense, to be instinctive, the unconscious dictate of habits, modes of life and thought which lie on the same plane with those of the parties whose controversies are to be determined. It is not in human nature to be content with the judgments of those who are far removed in modes of life, thought and action; and it is never to be forgotten that in the composition of the controversies which inevitably arise in civilized society, that tribunal is to be most highly valued which not only renders just judgments, but judgments which seem just to those who are chiefly affected by them. It is the instinct of our nature to desire a sympathetic or kindred tribunal, not a tribunal that shall decide *for* us so much as one that shall decide from a practical familiarity with the conditions out of which the facts of a given case have arisen.

A jury of one's countrymen, the verdict of one's fellow-citizens or neighbors, answers to this instinctive sentiment and demand. Such a tribunal will itself share in the good or evil flowing from its judgments. Such a tribunal robs the disappointed suitor, or the convicted criminal, of those complaints and feelings of injury which will surely assert themselves if the tribunal be not of the body of the community where the facts arose. It is not the absolute wisdom of the jury, it is not the certainty that its conclusions will be consonant with the most carefully considered views of the most highly-trained minds, that gives to the jury its superiority as a practical instrument for the settlement of civil disputes or for determining the guilt or innocence of those charged with crimes, but it is because being actually representative of the community, it brings necessarily and unconsciously to its task the knowledge which comes of likeness of life, habits, pursuits and sympathies, which is essential to the best practical results in its judgments, and still more essential to the peace, content and harmony of the society most directly affected by its judgments.

The mode of selection of jurors is likewise an essential element of the value of the system. Juries come not only from the body of the community where the facts arose, but they come at random and by the contrived chances of secrecy. The whole community of mature, self-supporting, independent citizens are the materials of our juries. It is not seldom suggested that if the best men of the community were alone selected, the results would be better. We may concede here that some individual cases might be more correctly deter-

mined, some miscarriages of justice be prevented, by restricting the range of choice of jurors, but if the highest average of good judgment in causes comes from the possession not so much of highly-trained intellectual faculties as from the instinctive sense and faculty of judging justly which grows out of an intimate knowledge of the life of the community where the facts arise, and if the stake which all duly qualified jurors must ordinarily have in the welfare of their community is the best safeguard we can set up against corrupt, partial or careless judgments of juries, then the rule which selects jurors by lot or chance out of the whole body of the community, and not from those having superior intellectual qualifications, is the rule best adapted to secure judgments conformable to the welfare of the community and the demands of truth and justice.

Two other considerations implicitly involved in what has already been said may well be specified here: first, the fact that the jury is a constantly changing body, a strictly temporary and occasional tribunal as to its *personnel*; and secondly, the sense of safety and freedom which a tribunal chosen wholly from the community at large gives to its members.

No feature of trial by jury is more unique than its constant change. A juryman is not an officer. He is not, even for the nonce, covered or adorned with any official insignia or rank. He has no tenure. The lot draws him to the jury today and tomorrow he returns to his wonted life and pursuits. He is a juryman solely by virtue and right of his membership of the community. He discharges only the duty of a citizen while he acts as a juryman. He belongs to no class, to no profession; he has no characteristics in himself or by virtue of his duty and function as a juryman, which do not come solely from his character of citizen. By the very conditions of his eligibility to jury duty, he is simply one of the body of the community. He acts his part as a juryman for an hour or a day and returns to the body of the community without mark, badge or trace of professional or official distinction.

If now it be true that civil liberty is the end of civil law and civil society, and if civil liberty reposes for its ultimate security on the capacity of the people at large to guard their rights and exercise their privileges, and not on the benevolence of rulers or elected officers, or the wisdom of legislators, then it is upon such

a representative body of the whole community as the jury presents, that we ought to, and must, rely for administering and enforcing the provisions of civil law and the machinery of civil society. Men sometimes say this is government by the lowest, not by the highest; our answer is that it is the mass, the body of the community, which most needs the protection of laws and their just administration; that the wise, the learned, the rich, and those high in position, have other weapons to defend their liberties; but the body of the community needs to sway the power of the jury as the one instrument which has proved the people's check to tyranny and their defence against despotism. No single feature of our civil life presents such freedom from officialism, from professional or class influences, and the influences of routine and artificial life, as the jury as now constituted in this country. No other agency may, therefore, be so safely relied on to enforce and administer those rules of property and of conduct, the infraction of which is the occasion and warrant of nearly all our civil laws and jurisprudence.

But I must not fail to draw attention to another notable function and influence of the jury — its direct educating influence. I have already dwelt upon the fact that the very essence of trial by jury is the principle of fairness. "The right of being tried, of having his dispute with another settled by his own fellow-citizens, taken indiscriminately from the whole mass, who feel neither malice nor favor, but simply decide according to what in their conscience they believe to be the truth, gives," says another, "every man the conviction that he will be dealt with impartially, and inspires him with the wish to mete out to others the same measure of equity that has been dealt to himself."

The value of the jury as a social and political, as well as a judicial institution, can hardly be denied by those who have well considered the subject. So acute a student and observer of English and American institutions as Tocqueville has pointed out the greatly increased influence of trial by jury in its application to civil as well as criminal causes. When applied only to criminal causes, he says, the people see it in operation only at intervals, and in particular cases; they are accustomed to dispense with it in the ordinary affairs of life, and to look upon it merely as one means, and not the sole means, of obtaining justice. But when it embraces civil actions, it is constantly before their eyes and affects

all their interests. "The jury," he continues, "and especially the civil jury, serves to imbue the minds of the citizens with a part of the qualities and character of a judge; and this is the best mode of preparing them for freedom. It spreads amongst all classes a respect for the decision of the law." . . . . "It clothes every citizen with a kind of magisterial office; it makes all men feel that they have duties to fulfil towards society, and that they take a part in its government; it forces men to occupy themselves with something else than their own affairs, and thus combats that selfishness which is, as it were, the rust of society."[1]

But it is as an instrument of education that it calls out his most ardent admiration. He calls it a school into which admission is free and open always, which each juror enters to be instructed in his legal rights, where he engages in daily communication with the most accomplished and enlightened men, where the laws are taught to him in a practical manner, and are brought down to the level of his apprehension by the efforts of the advocates, the instructions of the judge, and the very passions of the parties to the cause.

And this is the political training which is indispensable to the security of self-government, that self-government which is the special form of our civil freedom. The jury is the most direct and patent exhibition of the principle of making the people the arbiters of all questions affecting their property, their liberties and their lives.

There have doubtless been extravagant eulogists of Trial by Jury.[2] Its defects and limitations have been wholly lost sight of in admiration of some of its shining benefits. But when viewed with entire soberness of temper and judgment, when considered in a scientific or philosophical spirit as an actual institution, a part of the machinery for securing our common every-day rights and liberties and for protecting society and individuals against civil and criminal wrongs, it seems to me in the main to warrant our most cordial support and confidence. No substitute for it has been or

[1]La Dem. en Amerique, Tom. II, 188.

[2]As witness this famous but preposterous utterance of Lord Brougham:—"In my mind he was guilty of no error; he was chargeable with no exaggeration; he was betrayed by his fancy into no metaphor, who once said, that all we see about us, Kings, Lords and Commons, the whole machinery of the State, all the apparatus of the system, and its varied workings, end simply in bringing twelve good men into a box."
Present State of the Law, Feb. 27, 1828.

probably can be devised which could bring to our society so much strength or to our liberties so much security.

Undoubtedly one of the chief peculiarities of our jury system, as it now exists, is the requirement of unanimity in the verdict. This feature attracts and deserves careful consideration. In its origin, as has already been pointed out, unanimity, in the sense of an agreement of all the members of a jury, was not a requirement, nor was the requirement of the concurrence of twelve jurors universal and absolute until the reign of Edward III., in the first half of the 14th century. Thus, as we have seen, in the assise of Henry II., a concurrence of twelve jurors was essential, but if twelve did not at first concur, other jurors were added until at least twelve agreed upon a verdict — a process called by the somewhat sinister term of the *afforcement* of the jury, though no compulsion or violence was imposed on any juror by this process. But when we recall that at this period of the jury, the jurors were merely witnesses to facts within their own knowledge, we see that the concurrence of twelve jurors was in substance a requirement of the concurrent testimony of twelve witnesses to conclusively establish a finding upon the issue presented. The verdict of eleven out of the twelve jurors was likewise allowed till the time of Edward III.

The rule of the concurrence of twelve jurors at a time when the jury was indeterminate in number was certainly a reasonable one in view of the fact that it was established when jurors were the only witnesses whose evidence was heard. But when the whole number of trial jurors was limited to twelve, and especially when jurors ceased to be witnesses and became only the judges of the testimony of others, the requirement of the unanimity of twelve was transferred and continued in spite of the essential and radical change in the constitution and function of the jury.

We may say, therefore, that the requirement of unanimity of jurors was, in the original application to the jury as it now exists, due not to any settled or well-considered policy but to the accident that a similar rule had been previously applied when the jury was different in number and character. The original requirement meant simply that in questions of disputed facts the concurring testimony of twelve witnesses should be necessary to a verdict. The present requirement is that in questions of disputed facts

twelve jurors shall concur in their opinion of all the testimony presented to them. As matter of history, therefore, as well as matter of reason, the requirement of unanimity does not stand upon an equal basis of authority with the other features of the jury.

When the question of the reasonableness of the rule of unanimity is considered, it may at once be said that the rule is almost wholly exceptional in respect to judicial as well as other affairs. In our courts of common law and of equity, and in our Courts of Appeal, if judges differ in opinion, the opinion of the majority prevails, and if the judges in Courts of Appeals are equally divided in opinion, the judgment of the court below stands affirmed. In the House of Lords, sitting as a Court of Appeal, or for the trial of a peer, or on the impeachment of a commoner, a majority of one determines the verdict and judgment. In legislative or parliamentary matters of all kinds, as well as in popular elections, the rule of a greater or less majority universally prevails.

The reasons which support the rule of unanimity are not without force. It often happens that it is the one competent, thoughtful, conscientious juror who by his dissent compels a full and fair consideration of the evidence, and thus becomes a safeguard against precipitancy and passion in the rendering of the verdict. The fact alone that unanimity must be reached before a verdict can be rendered, tends strongly, beyond doubt, to produce fair deliberation and due discussion in reaching the verdict. This is an unmixed and unquestionable good. But the question remains whether an absolute agreement of the twelve ought still to be required. I confess that in criminal cases I am strongly of the opinion that unanimity is the only safe rule. If the numerous instances of disagreements of juries whereby those who are believed to be guilty, go unwhipt of justice, are pointed to as results of this rule, the answer is that the cases are very few in which it is possible to affirm the guilt of those who thus escape. But more than this, it cannot be too often said, or too deeply impressed, that the object of our criminal law is not merely to procure convictions of those charged with crimes, but it is to furnish a tribunal where the innocent will escape as well as the guilty be condemned. The glory of our modern ameliorated criminal law and procedure is, above all, that it no longer aims primarily and principally to secure the conviction of alleged criminals. Torture, the rack and the pulley, the inquisitorial examination of the accused,

were the fit instruments of ages when a trial was not so much an inquest or inquiry as a mode of legally condemning those whose cases were already prejudged. Individual human life and individual human liberty are sacred things. Nothing is more sacred except the lives and liberties of the whole community. The safety of society alone warrants criminal punishment. To convict and punish an innocent man is to do the gravest possible injury to the victim and to justice. No danger or exigency can warrant or excuse it, nor can any fancied necessity of society justify the adoption of any rules which are likely to result in unwarranted and unjust convictions, and I am sure that the requirement that society's great prerogative of criminal punishment shall not be exercised till twelve men sitting as a jury are persuaded by evidence that the real criminal is before them, is not too stringent a rule in behalf of the accused, nor too high a barrier against haste, prejudice, and the spirit of vengeance to which not individuals alone, but whole communities are so constantly exposed. The true maxim is that the judge is condemned, not when the guilty escape, but when the innocent suffer.

The rule of unanimity has, however, been unreservedly condemned by high authorities. Mr. Hallam,[1] in his "Middle Ages," styles it "that preposterous relic of barbarism;" Mr. Starkie[2] says "the rule has descended to us in a state of unmitigated barbarism;" and Professor Christian,[3] the learned commentator of Blackstone, says "The unanimity of twelve men, so repugnant to all experience of human conduct, passions, and understandings, could hardly in any age have been introduced into practice by a deliberate act of the legislature, and it remains to be seen whether the legislature will much longer tolerate such an anomaly."

But Forsyth, while pointing out and emphasizing the unreasonableness of the rule of unanimity, admits that the countervailing considerations, such as we have just adverted to, render it wise and salutary to retain the rule in criminal cases, though he concludes his chapter on this topic with the remark that "it would perhaps not be difficult to prove that it is better to allow the opinion of the majority to prevail in both civil and criminal cases, than to demand unanimity in the former."[4]

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[1] Supp. Notes, Mid. Ages, 262.
[2] Tr. by Jur., 49.
[3] *Vide* Forsyth, Tr. by Jur., 209.
[4] *Id.*, 211.

Civil cases, however, present other considerations, and in civil cases the report of the Parliamentary Commission upon the English Courts of Common Law in 1830 seems to set forth well the reasons for a change and the extent and conditions of the change.

"We purpose," say the Commissioners,[1] "that the jury shall not be kept in deliberation longer than twelve hours, unless at the end of that period they unanimously concur in applying for further time, which in that case shall be granted; and that at the expiration of the twelve hours, or of such prolonged time for deliberation, if any nine of them concur in giving a verdict, such verdict shall be entered of record, and shall entitle the party in whose favor it is given to judgment; and in failure of such concurrence the cause shall be made "*a remanet*," that is, a mis-trial.

There is one other feature of our jury system on which I am moved to comment and criticism. I have heretofore adverted to the consideration that special intellectual, technical, or professional training is not what we seek or need for jury service, or for its most efficient and satisfactory discharge, but there is a tolerably well-defined class of cases arising more frequently in the progress of the commercial life and development of recent years, of which it does not seem too much to say that they are in their nature unfit for jury trial. I refer to a class of cases thus described by a recent writer:[2] "Cases involving large mercantile or shipping transactions, operations in stocks, disputes between great corporations about matters of franchise, and others of similar kind, which may be characterized as causes arising from the investment and handling of large amounts of capital in active business."

Very few, comparatively, of any community have such knowledge of this class of transactions as is requisite to understand them, much less to pass upon them. The feeling and judgment, I believe, is well-nigh universal with those called upon to conduct cases, as well as with the litigants therein, that such cases cannot be submitted to ordinary juries with the prospect of correct or even intelligent verdicts. To continue to require that such cases, involving questions not only of intricacy and complication, but of a nature which lies outside the experience or observation of most men, and dependent for correct solution and decision not on principles of common sense or common experience but on the results

[1] *Vide* Forsyth, Tr. by Jur., 209.
[2] L. Skidmore, Prize Essay, Am. Bar Assoc., 1884.

of minute, varied, complicated and involved sets or series of transactions, to be viewed not in general or loosely, but with strict reference to details and with knowledge and appreciation of most difficult and technical questions and rules of commerce and business,— transactions, too, extending often over many years and through many changes in the *personnel* of the actors,— to require such cases, I say, to be submitted to ordinary juries, is plainly, in my judgment, to submit to chance and accident what should pass under the scrutiny of minds fitted by some previous training or experience to treat them with intelligence.

The legislation, statutory or constitutional, which shall aim to effect the change here contemplated, should, however, be most carefully guarded in its description of the excepted cases, in order not, under the guise of this reform, to narrow, in other respects, to the smallest extent, the province of jury trials in the full scope which they have hitherto been given in our jurisprudence.

In the course of the historical development of trial by jury as respects its general constitution and functions, we have noticed three prominent stages; first, the jury as simple recognitors, selected because of, and acting throughout on, their own knowledge of the subject of investigation; secondly, the jury exercising the mixed functions of recognitors on their own knowledge, and judges of the fact upon evidence laid before them; and thirdly, the jury acting solely as judges of the facts brought before them by the evidence of witnesses. It is, perhaps, impossible to fix an exact date when the jury as simple recognitors was first established, but if we find its source as a well-defined part of English law in the assise of Henry II., about the middle of the 12th century, and if the period of the introduction of the second stage — the jury acting in part as recognitors and in part as judges of facts testified to them — be fixed, as Mr. Starkie fixes it, in the reign of Edward III., or a little before the middle of the 14th century, and if the date of the final and universal limitation of the function of the jury to the determination alone of questions of fact upon evidence submitted to them under the guidance of a judge, be fixed as the first year of the reign of Queen Anne, or the year 1702, we shall see that the first stage continued nearly two centuries, the second stage a little more than three centuries and a half, while the third stage has now extended over nearly two centuries,— the latter

period covering nearly all of what may properly be called the enlightened development and humane amelioration of English law.

That the limitation of the function of the jury to questions of fact is the result of the evolution or growth of our law for the last two centuries is high proof certainly of the wisdom and practical value of this limitation. It may, in truth, I think, be regarded as the ripest and best fruit of our legal experience and reflection as applied to the trial by jury. It may be looked upon, too, as the result of mature and considerate reflection and purpose in contrast with some of the more fortuitous or accidental of the earlier forms and stages of the system. Lord Mansfield, near the close of the last century, declared that "the fundamental definition of trial by jury depended on one universal maxim which admitted of no exception,— *Ad quæstionem juris non respondent juratores; ad quæstionem facti non respondent judices;*"[1] and I cannot hesitate to express my own belief that the firm and unshaken establishment and continuance of this feature of trial by jury is the absolute condition of its permanent acceptance by any people who are intelligent and jealous of civil freedom.

It is not, however, to be denied that this restriction of juries to questions of fact has been often represented as an encroachment upon the just province of juries. At almost all times, there may be said to be a feeling in many minds, amounting at times to a popular impression or sentiment, that all questions, especially in criminal cases, should be submitted to the jury. It seems clear, however, that the very characteristics of a jury which render it a fit instrument for solving questions of fact,— its constant familiarity and sympathy with the common life, motives, habits and feelings of those who for the most part are engaged in litigation or affected by criminal proceedings, its free and unofficial character, its freedom from the influences of class or professional training and instincts, the brief, almost momentary period of its service and its quick disappearance into the indistinguishable mass of its fellow-citizens,—all these incidents and qualities of the jury actually unfit it for the function of determining what is the law which shall govern a case and in the light of which the facts are to be weighed and applied.

It is not needful here to raise any question of the relative im-

[1] Op. on motion for new trial in case of Dean of St. Asaph.

portance of the functions of the court or judge on the one hand, and of the jury on the other, for it is certain that these functions are essentially dissimilar. The law is, and must ever be, an aggregation of rules and principles requiring for its knowledge and application the most disciplined mental faculties and much special and technical training. The law, too, especially our law, whose glory it is that it has sprung by a free and natural process from the life and wants of the people, is linked together from generation to generation through centuries of unbroken evolution. No branch of our law is without its special history and its accumulated literature and learning. Precedent is the ligament that binds it into an intelligible and consistent whole.

That the English doctrine of Precedent, or the controlling force of established rules and decided cases over subsequent cases, is not thus esteemed by some even of the legal profession, is well-known. At a recent session of the American Bar Association this doctrine was thus characterized by a learned and eminent lawyer,— "Our progress in law reform is slow," said he, "and slow for the most part because we are dragging the old fetters of precedent and tradition, instead of boldly and freely abandoning the past and taking as our guides our present free thoughts and aspirations and hopes." Against all such passionate, though eloquent and enticing appeals, I would oppose what I believe to be the conclusions of reason and of history, that the doctrine of precedent or authority is at all times essential to the idea of the law, and that its prevalence in English jurisprudence is perhaps the most potent cause of the present superior value and influence of English law.

It will not be needful to consume time in demonstrating that to commit the law to juries is to destroy the possibility of the regular or effective application of the doctrine of *stare decisis*. To retain and apply this doctrine when juries become judges of the law as well as the facts, would require of juries much of the same special training and high mental power which the office of a judge now demands. It would commit to the decision of an unskilled body of citizens the determination of what our law and jurisprudence is today; and it would commit to a like unskilled body tomorrow the question of what our law and jurisprudence shall then be.

The close of the 18th century witnessed a contest in England concerning the powers of juries, which, having ended in a victory

for the juries as well as for popular rights, is often referred to as in some way an evidence that an enlargement of the powers of juries is an advance in the security of the people's liberties.

But the struggle for the rights of juries in criminal informations or indictments for libel, was not a struggle for the power of juries to determine the *law of libel*, that is, what constituted a libel or libellous publication as matter of law. It was rather a struggle for the right of juries upon the facts as given in the testimony and the law as laid down by the court, and upon a plea of "not guilty," to render, as in other cases, a general verdict of "guilty" or "not guilty;" and the victory won for juries was only the establishment of the right of the jury not merely to pass upon the fact of publication and the truth of the innendoes of the record, but to find upon the whole matter in issue, and such is the scope and limit of Fox's Act of 1792 which closed the struggle. The result was in truth a restoration or relinquishment to the jury of powers which logically and reasonably belonged to them in cases of libel as in other cases. Such is the express tenor of Erskine's famous argument in the case of the Dean of St. Asaph. "My first proposition," said the great advocate,[1] "is that when a bill of indictment is found, or any information is filed, charging any crime or misdemeanor known to the law of England, and the party accused puts himself upon the country by pleading the general issue — not guilty — the jury are generally charged with his deliverance from that crime, and not specially from the fact or facts in the commission of which the indictment or information charges the crime to consist."

The correct statement, therefore, of the function of the jury in the American system of trial by jury is this: That upon the evidence presented and admitted by the court, the jury has the power and right to find a verdict upon the whole issue; that is to say, whether upon the facts as determined by themselves, and upon the law as stated to them by the court, they will find for the plaintiff or the defendant, or in criminal cases, guilty or not guilty. To this the exceptions in this country are so few and slight as hardly to merit attention here or to modify this general statement of this feature of the American system of trial by jury.

A somewhat compendious and accurate statement of the law on

[1] Speeches, 1, 262.

this point as it prevails now in most of our states, is the following, which I quote from the proposed Code of Evidence of this State.

"All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and all other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. And whenever the knowledge of the court is made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it."

"All questions of fact, other than those mentioned, are to be decided by the jury when a trial is had, and all evidence addressed to them except as otherwise provided in this Code."

Nothing, it must have been observed, has been or is now more constant or conspicuous in the constitution of the Trial by Jury than the complete identity of the jury with the great body of the people. It has been, in this view, well called "the country," the real representative of the average or common people. In its first form — while the jury were only a body of sworn witnesses — naturally the only qualification of jurors was that they should be freemen, and not villeins; and when it took on its permanent form and function — a body of twelve men empowered and sworn to make true deliverance upon the evidence legally presented and the law as delivered by the Court or Judge,—it was by choice, by lot or chance, from the whole mass of qualified citizens of the country, that the jury was chosen.

In addition to this general fact, there are some special circumstances which ordinarily have the effect of still further limiting the range of choice of jurors to the commonalty, using this word to designate, according to Webster, "that part of the people who live by labor, and are not liberally educated, nor elevated by office or professional pursuits." Of these circumstances, three may be named here: first, the usual exemptions and disqualifications from jury duty include all our higher executive public officers, members of the legislature, judges and clerks of courts, clergymen and those acting as ministers of any religion, physicians and surgeons, attorneys and counsellors-at-law, professors and teachers, superintendents, engineers and their assistants engaged in the public service or in the regular service of common carriers, telegraph operators and officers of the militia performing military duty. Add to these the exemptions granted by the laws of the United

States, and it will be seen how considerably the range of choice is restricted to what we may call the common people: secondly, the time required for the discharge of jury duty and its meagre compensation, and the consequent sacrifices it imposes, induce the greater part of our citizens engaged in large and active business pursuits, to seek to evade jury duty, and it is observable everywhere that such classes do succeed to a great extent in escaping from this duty: thirdly, jury duty in its nature and incidents, can have of itself little or no attraction for the more cultivated classes. The inevitable tedium of ordinary civil trials, the repulsive nature of many criminal trials, the physical hardship of others, and the irksome sense of responsibility which is found by experience to press upon the conscientious juryman, render the service one from which the best men are apt to shrink and to seek exemption. There remains, therefore, as the body from which our jurors are generally taken, comparatively few except those whom we have called, for want of a better term, the commonalty.

One obvious result of this general fact — a result which is often made a reproach of the system of trial by jury — is that the jury shares to the full in all the limitations of the great body from which it comes — in all its ignorance, all its prejudices, its emotions and passions, its inveterate tendencies, and its passing whims or fancies. It is in the strictest sense — in a sense far more strict than any other selected body gives us — the people.

Here, then, we have a body apparently not fitted to any high degree for the delicate and solemn duty of administering civil justice, and liable to be moved by prevalent popular impulses which sometimes are cruel, passionate and vengeful, and at other times weak, forgetful of the public weal, and responsive to public clamor. I do not seek to hide this practical, well-observed fact. The jury *is* at all points tempted as the people are. Like the people, it sometimes fails almost wholly to do justice or to promote the public good. This country has seen, and now sees in some of its parts, juries letting go popular criminals, standing in awe of mobs and law-breakers, or cringing before powerful and rich malefactors. But consider for a moment the nature of our society and government. Freedom and self-government are our aim, our method and our boast. Freedom involves the possibility, the probability, the certainty of its abuse. Freedom, guided by corruption and passion, has painted some of the ghastliest scenes in history. We

know well that popular freedom and popular institutions are safe only when the balance of popular sentiment and purpose is toward order and justice. We recognize the fact that intelligence and virtue must make and save the State, but we know as well that our fabric of government rests on the people — "government of the people, by the people and for the people," to put it all in the phrase which Abraham Lincoln did not originate, but did consecrate. The people commit follies; great waves of wickedness and wrong sometimes sweep them far from their moorings. Still do we not cry, "Long live the people?" For my own part, my faith in the great tenet of government by the people is well-nigh as invincible and unbounded as my faith in the wisdom and goodness of the Divine government over all. "The cure for the ills of Freedom," as Macaulay has told us, "is Freedom." "The test of freedom," says Emerson, "is the only test permissible in our country." "If," said Theodore Parker, "the inconveniences of freedom distress you, you have your remedy in going to a monarchy." "The propositions of civil equality and self-government," said Mr. Lincoln in his debates with Douglas, "are our creed, and we must take what they bring—the bad as well as the good. Our part is to make the bad as small as we can."

So it is with juries, which are always a part of the people. Juries are always precisely as good as the communities from which they come. The follies they commit cannot be prevented except by the same people of whom they are the exact representatives. No guards can be devised against such results except the virtue and intelligence of the people. Freedom fettered, is slavery, and not freedom. Fixed institutions, regular forms and methods of action are not fetters, but the tried means of freedom. When, therefore, I hear the jury system decried in view of some great miscarriage of justice like the Star Route Trials, I try to remember that it is better, infinitely better, that the people should rule ill than that a despot should rule well, and that trial by jury is no more exposed to abuses than are all our methods of freedom and self-government.

A study of the whole field of inquiry and research involved in a proper discussion of our system of trial by jury, will disclose the fact which might well have been anticipated, that this system has been the special mark of criticism, opposition, contempt even, at

the hands of a long and unbroken and still continuing line of legal reformers, precisians, sciolists, closet-students and *doctrinaires*. The type of these is Anacharsis of Athens, who one day went into the forum to hear a cause argued and when asked what he thought of Athenian liberty, said, "I think wise men argue causes and fools decide them." Trial by jury has lived and flourished, nevertheless, in spite of this long procession of antagonists, because, as Mr. Burke has said of the British Constitution, "its roots strike deeply into the firm soil of our English nature as trained and nurtured by the strong influences of a history in which it has somehow always seemed to the popular eye and sense to stand for the rights of the people against priestly encroachment and royal prerogative." Half, perhaps more, of its value today, I unhesitatingly concede and insist, is due to its historical affinity with the last five or six centuries of our English and American history. But surely he has read history or studied human nature to little purpose who has not perceived that the correspondence of institutions with the thought and aspiration of society, is the nearest approach to infallible proof of the value and perfection of such institutions; that innovation is not true progress; that, in truth, the best and greatest part of true progress consists in true conservatism; but that it is equally clear that blind attachment or unreasoning adherence to institutions even when consecrated by time and familiarity, is not true conservatism. No finer expression of the proper blending of these two qualities or states of mind, has ever been given than the great Apostle's, "Prove *all* things, hold fast what is *good*."

Certainly, no one who enters upon an examination of our system of trial by jury should fail to take note of the opinion not seldom expressed, and doubtless far more widely felt, by some of the most intelligent and thoughtful, that the system is unequal to the demands of many occasions which arise in modern life when widespread forms of crime seem to have poisoned the air and dulled the popular sense of order, law and justice. Such critics and observers can point, as we have seen, to some startling lapses of juries in dealing with criminals who have entrenched themselves in some sort in the very citadels of power, who have seized upon some of the chief agencies of popular government and corrupted the very sources of public justice. For considerable periods in our recent history, the taint and blight of corruption has seemed

to fall upon communities to such a degree as to make it doubtful whether juries could be found who by their verdicts would arrest the evils and crimes which were so dominant and pervasive. If there be ground at times for the fear that the people, through the craft of leaders, the indifference and unconcern of the better classes, the ignorance and corruption of the lowest, may put in peril the great and permanent interests of society, and if it be true that in such crises, juries are specially liable to yield to the prevailing tendencies, I think, nevertheless, we are warranted in a firm faith based on the sum of all our later experiences, that after all, the people at large, the body of our communities, of which juries are a constant part, are still and will be in the future, equal to the stern task of upholding the laws and punishing popular crimes.

But I know of no way in which I can at once present the grounds of this faith, and an exhibition of the working and power of our jury system today, so well as by a brief summary of a very recent effort through the agency of jury trials to bring to punishment the authors and actors in a vast scheme of bribery and corruption in the city of New York.

In 1884 the Board of Aldermen or Common Council of the city of New York consisted of twenty-four members,—one member for each city ward. The Board had power to grant franchises for the use of the streets of the city for railroads, the Mayor having the usual veto power and the Common Council the power of passing a measure over the veto. The franchise to establish and run a railroad through Broadway below 14th Street, had been eagerly sought by several corporations and capitalists, and among others by Jacob Sharp, an experienced lobbyist, a grasping money-getter, a cynical and stolid believer in the maxim that every man has his price. Though one million of dollars had been offered by another party for the Broadway franchise, the Common Council voted to give it, without compensation to the city, to the corporation at whose head was Jacob Sharp. The resolution of the Council was vetoed by the Mayor and injunctions of the courts were interposed. On the 30th of August, 1884, a special meeting of the Aldermen was hastily called at which — the opposition of other interests and especially of those who had obtained injunctions, having been bought off by lavish expenditures of money, under the guise mainly of counsel fees—the Common Council hur-

riedly passed over the Mayor's veto the resolution giving the franchise to Jacob Sharp's corporation, only two of the Aldermen opposing the grant.

From the first, the belief that this result was secured by stupendous bribery was nearly universal, and by means of a legislative investigation in the winter of 1885-'86, many of the features of such bribery were laid bare. In March, 1886, the matter was investigated by the Grand Jury of the County of New York, the result being the finding of indictments subsequently against twenty-one of the twenty-four Aldermen for receiving bribes, and at a later period against Jacob Sharp and three of his associates for giving bribes.

It is proper here to call attention to the wide-spread power of the combination which effected this great criminal exploit. In the first place, the Aldermen, with the exceptions noted, were the ripe legitimate fruit of the corrupt and corrupting political methods of our great commercial metropolis. Each Alderman was the local chief of his party, the head of a great body of janizaries banded together for the purpose of grasping and holding the spoils of party victory — the emoluments of office and the incidental chances for other plunder and profit. It is hardly possible to overstate the extent and intricacy of the ramifications of the influence of these party leaders thus made legislators for our greatest city. The community was appalled at the magnitude of the crime believed to have been committed, and looked with a sort of despairing incredulity on all efforts or thought of efforts, made to bring these master-criminals to punishment. Certainly no circumstances could well be imagined more likely to defeat convictions before juries of the city and county of New York than the circumstances existing at the time when the work of prosecution was begun. Fortunately for public justice, the prosecuting officers of the county were men of great skill and ability, and directed their efforts, with apparent singleness of purpose, to the discovery of the real facts and the relentless trial of the accused upon the law and the facts. But it will be remembered by all who watched this struggle that the jury of the vicinage, drawn as it must be by lot from the whole body of qualified citizens — the constituents and fellow-partisans, as a majority of them must have been, of the accused Aldermen — was pointed to as the weak, probably the fatal, spot in the machinery of criminal prosecution.

It is necessary to pause here a moment to describe, as briefly as may be, the jury system of the city of New York. All trial jurors in that city are selected not as in other parts of the state, nor as generally in other states, by the ordinary officers of the town or city, but by a single officer, called Commissioner of Jurors, appointed by the Mayor. This fact, I think it is generally conceded, has, or is calculated to have, an unfavorable effect upon the selection of trial jurors, because the Commissioner is regarded as a partisan appointee, and in fact owes his position to partisan influences, and it is certainly noticeable that in the trials which we are now considering the Commissioner of Jurors fell under the grave censure of the Court as well as of the public.

The qualifications of jurors in the city of New York are in general those of other localities,— male citizens, between the ages of 21 and 70, owners of $250 worth of property, or husbands of wives who are such owners, not infirm or decrepit, intelligent, of sound mind and good character, able to read and write the English language understandingly. These qualifications show at once how much depends in the selection of jurors on the integrity and impartiality of the Commissioner of Jurors, and how difficult it is for the most vigilant prosecuting officers to exclude all incompetent jurors from the panels when once admitted to the list by the Commissioner, and it should be remembered that the difficulties of the prosecution of the accused Aldermen were greatly increased by the careless or corrupt manner in which the Commissioner appears to have done his work.

There seems to be a popular impression that the right of challenge of jurors, and the grounds and practice of challenge, in the city of New York are somehow more loose and favorable to the accused than they should be or than they are elsewhere. This impression, in spite of the success of the Aldermanic prosecutions, apparently remains in many minds as a reproach to the system of trial by jury. No good ground appears to exist for these animadversions. The right and grounds of challenge to individual jurors in the city of New York do not differ essentially from those generally prevailing and sanctioned by the best practice elsewhere. The number of peremptory challenges allowed to either party in capital cases is 30; in cases punishable by ten years imprisonment or more, 20; in all other cases, 5. Causes of challenge are of two kinds, (1) for *implied* bias, (2) for *actual* bias; implied bias

arising from facts which the law regards as disqualifying one for jury duty, as consanguinity or affinity to the accused, or conscientious opinions which would prevent one from finding the accused guilty; actual bias arising from the existence of a state of mind on the part of the juror which satisfies the Court that the juror could not or would not impartially try the issue. And here it is specially to be noted that the Code of New York in terms provides that "the previous expression or formation of an opinion in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, if the juror declare on oath that he believes that such opinion or impression will not influence his verdict, and the Court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict." Could any more reasonable provision be devised or one better suited to admit intelligent, law-loving, crime-hating citizens to the jury box? One would imagine, in reading many newspaper comments on the selecting of the juries in the Aldermanic cases, that our law had been framed to exclude all intelligent citizens, especially all readers of newspapers. Nothing could be further from the fact. The fact that one has read all the newspaper reports and comments of an alleged crime, together with the fact that such reading has resulted in an opinion of the guilt or innocence of the accused, does not support a challenge or exclude one from the trial jury, unless the proposed juror either confesses he cannot find an impartial verdict, or the Court upon the evidence decides that he cannot render such a verdict. It is certainly indisputable by thinking men that in either of the latter cases the challenge should be sustained.

With these remarks on the jury system of New York city, bearing in mind the character of the Aldermanic crime, the relations of the accused to their several constituencies, the solidarity of their interests as defendants — twenty-two well-known leading politicians, the choice of a majority of the citizens as city legislators,— the fact that the accused had the money — four or five hundred thousand dollars — which they had corruptly got, in their pockets for their own defence, the slipshod manner, to use no harsher word, in which the selection of jurors was made by the Commissioner, let us now see how the system of trial by jury stood the strain put upon it.

A few statistics will be useful here.[1] Four trials of indicted Aldermen and one of the briber, Sharp, have taken place. The first Aldermanic trial was begun May 10, 1886, the jury was completed on the 13th, a verdict of guilty was given on the 15th. The second trial was begun November 15, 1886, the jury was completed on the 17th, and on the 24th the jury disagreed and were discharged. A second trial of the same case was begun November 29, 1886, the jury was completed December 8th, the verdict of guilty was rendered on the 15th. The third trial was begun January 24, 1887, the jury was completed on the 27th, the verdict of guilty was given February 1st. The fourth trial was begun February 28, 1887, the jury was completed March 18, the jury disagreed and were discharged on the 23rd.

It will be seen that the whole number of days occupied by these four trials and one re-trial, including Sundays, holidays and adjournments, was 61, or about 12 each. I regret I have not succeeded in ascertaining the exact number of full court days occupied, but my best information fixes it at about 46, or an average of about 9 days to each trial.

It will be seen, too, that the time occupied in selecting the jury gradually increased as the trials went on — and this for obvious and unavoidable causes — from two or three days, as in the first two trials, to not less than two weeks in the trial of the fourth of the Aldermen.

It should be said that the cause of the mis-trial or disagreement in each instance appears to have been the reluctance of the jury to convict upon the evidence of the perjured accomplices of the accused — a reluctance not surprising nor unusual, since there are conflicting views among courts and text-writers in respect to the required amount and nature of the corroboration of such evidence. I am not aware that any corrupt or improper motive has been charged upon either of the disagreeing juries.

It is of interest also to note that in the fourth trial the whole number of jurors summoned was 324, the whole number examined, 205, while the prosecution exercised 13 of its peremptory challenges and the defence only 6; that in the fifth trial the whole number of jurors summoned was 1,050, the whole number examined, 594; the prosecution exercising 17 peremptory challenges, and the defence 20.

[1] I wish to acknowledge my indebtedness to the special kindness of Mr. District Attorney Martine of New York city for most of the statistics given here.

The trial of Jacob Sharp was begun May 16, 1887, the jury was completed June 15th, and the verdict of guilty was given June 29th. In this trial the whole number of jurors summoned was 2,100, the whole number examined, 1,196; the prosecution exercising 15 peremptory challenges, and the defence 20. In this case, 44 calendar days elapsed from the beginning to the end, and if I am correctly advised, 31 full court days were consumed, 22 of which were occupied in selecting the jury.

Thus it appears, that in these five trials and one re-trial, about 90 days were actually occupied, about 4,524 jurors were summoned, of whom about 2,610 were examined in order to secure six panels, or 72 in number, of trial jurors.

Before these jurors thus selected, four convictions were secured — three of the bribe-taking Aldermen, and the arch-briber—while one mis-trial of an Alderman occurred.

The present fate of the whole twenty-two bribe-takers and the four bribe-givers who figured in this remarkable drama, reads like a page of romance, like some old poetic record of Nemesis. Of the twenty-two Aldermen who in 1884 stalked in lusty pride of power through the City Hall, three are now in Sing Sing; four are fugitives in British dominions; four, as the price of immunity from prosecution, have subjected themselves to the refined torture of testifying as witnesses to their own perjury and degradation; two are dead; one has been judicially declared insane; one not indicted, is kept under surveillance as a witness; and six are awaiting trial upon evidence which probably no one doubts will send them to keep company with their three comrades at Sing Sing, whenever the exigencies of the District Attorney's office shall make their trial possible.

Of the four bribers who stood on the pinnacle of fancied success in their great exploits in 1884 — the goal of a thirty years' struggle — one at 78 years of age is under sentence to Sing Sing; one is dead; and two are awaiting under enormous bail-bonds their trial and almost certain conviction.

This concrete example, this brilliant, and can I not say? conclusive, vindication of the adequacy of our present jury system to accomplish the purposes for which it exists, is worth more as evidence and argument in this discussion than all historical examinations or learned treatises upon trial by jury. No institutions, no machinery of government, are or ever will be automatic or self-

executing. Behind the best institutions, the best laws, the best machinery, there must be *men*. These not only "constitute a State," but they alone can make laws and institutions effective for good. If ever the people become corrupt, or if not corrupt, negligent of duty to a degree that permits corrupt men to control the machinery of government and the administration of the law, no laws or institutions will longer execute justice or uphold free government. But if the most we can expect of laws, institutions, governmental machinery, or jurisprudence, is to be servicable agencies in the hands of the people, adapted to secure liberty and justice when operated and applied to that end, then this example may long teach and assure us amidst many lapses and miscarriages arising from the temporary apathy of the people or the corrupt or partisan efforts of public officers, that trial by jury in the hands of fearless judges, and vigilant and competent prosecuting officers, is still fitted and adequate to punish wrong-doers, to protect the innocent, and to set those stern examples of retributive and vindicatory justice which are apparently sometimes necessary to the life and purity of civil society.

Ladies and Gentlemen of the Association: I trust it has been already clearly seen how little faith I have in any legal or jurisprudential changes which do not connect themselves naturally and organically with the Past. The genius of our race, in contrast to that of the French and some others is, as Mr. Lowell has put it,[1] our "profound disbelief in theory," and our disinclination to "commit the folly of breaking with the past." "Our fathers," he remarks, "were not seduced by the French fallacy that a new system of government could be ordered like a new suit of clothes. They would as soon have thought of ordering a suit of flesh and skin." So wide is the range and application of this thought beyond the one topic which we have been considering, that I beg to close with a word of a great Englishman who sometimes, if not always, puts great thoughts into the most powerful English now written. John Ruskin has said:

"All the best things and treasures of this world are not to be produced by each generation for itself; but we are all intended, not to carve our work in snow, that will melt, but each and all of us to be continually rolling a great, white, gathering snowball,

[1]Democ. and other addresses, 29.

higher and higher, larger and larger, along the Alps of human power. Thus the science of nations is to be accumulative from father to son; each learning a little more; each receiving all that was known, and adding its own gain. The history and poetry of nations are to be accumulative; each generation treasuring the history and songs of its ancestors, adding its own history and its own songs. And the art of nations is to be accumulative, just as science and history are; the work of living men not superseding, but building upon, the work of the past; all growing together into one mighty temple; the rough stones and the smooth all finding their place, and rising, day by day, in richer and higher pinnacles to Heaven."